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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

In re T.J., a Person Coming Under the
Juvenile Court Law.

CONTRA COSTA COUNTY BUREAU
OF CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

T.J. (Mother),

Defendant and Appellant.

A125897

(Contra Costa County
Super. Ct. No. J09-00155)

One-year-old T.J., a dependent child of the juvenile court, was born while her mother, appellant, was in custody facing charges that she allowed the severe physical abuse of her three-year-old son, D.J. The juvenile court declined reunification services and terminated Mother's parental rights to T.J. Mother contends the juvenile court was not informed of new information about the circumstances of her recent release from county jail which might have led to a different result. We disagree and affirm for the reasons explained below.

I. FACTS

We are aware of the facts surrounding the serious physical abuse of D.J. from a prior appeal. (*In re D.J.* (Jan. 22, 2010, A125112) [nonpub. opn.] (*D.J.*).) We briefly refer to our prior opinion.¹

“On October 17, 2008, respondent Contra Costa County Bureau of Children and Family Services (Bureau) filed a dependency petition [§ 300] against Mother . . . on behalf of D.J., who was then three years old [footnote omitted]. The petition alleged that D.J. had been seriously physically abused by Mother’s boyfriend” (*D.J., supra*, A125112, pp. 1–2.) The boyfriend was not D.J.’s biological father.

“On November 24, 2008, the Bureau filed an amended dependency petition alleging severe physical abuse of a child under five (§ 300, subd. (e)) and cruelty (§ 300, subd. (i)). The Bureau alleged that D.J. suffered severe physical abuse in Mother’s home at the hands of Mother’s live-in boyfriend, A.W. D.J. had suffered severe head and brain injuries, retinal hemorrhages, lacerations to his liver, and blunt abdominal trauma. A.W. had repeatedly struck D.J. with a belt, beat him, punched him, and bit him, leaving bruises, injuries, and scars all over D.J.’s body. The Bureau alleged Mother had done nothing to obtain emergency medical treatment for D.J., despite the fact that she saw his face and head were swollen and that A.W. was cleaning up blood.” (*D.J., supra*, A125112, p. 2.)

According to a Bureau report, Mother “admitted that she was present during [the] abuse [of D.J.], but did not intervene effectively to stop the abuse, or seek emergency medical treatment when [D.J.] was near death from battering by [A.W.]”

In the prior case, the juvenile court sustained the allegations of the dependency petition, denied Mother reunification services, and terminated Mother’s parental rights to D.J. We affirmed.

¹ In the quotations from the prior opinion and throughout the present opinion, statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Twins that Mother had with A.W., M.W. and D.W., were detained at the time of the injuries to D.J. The twins were about 7 1/2 months old. They were made dependent children of the juvenile court and placed in a foster home.

On October 28, 2008, Mother was arrested and charged with four counts of felony child abuse (Pen. Code, § 273a, subd. (a)) relating to the abuse of D.J.

T.J., the dependent child in the present proceedings, was born in February 2009 while Mother was in custody on the child abuse charges. When T.J. was two days old, the Bureau filed a dependency petition alleging there was no provision for T.J.'s support (§ 300, subd. (g)) because Mother was incarcerated "and unable to provide for her newborn daughter." The Bureau also alleged sibling abuse (§ 300, subd. (j)) based on the physical abuse of D.J. T.J. was placed in foster care.

The juvenile court sustained the dependency petition and found T.J. to be a dependent child. The court denied Mother reunification services and set a section 366.26 hearing (.26 hearing) for July 30, 2009.

In its report prepared for the .26 hearing, the Bureau informed the court that T.J. was placed in the same foster home as her twin siblings. She "is an extremely adoptable child." The foster parents wanted to adopt all three children, and had been approved by an adoption home study. "The prospective adoptive family has altered their [*sic*] life completely in order to accommodate [T.J.] and her siblings" The parents "repeatedly report that they are delighted with the children" They "have strong altruistic feelings about their desire to provide a loving home to children in need" T.J. "is placed in a loving family with her full siblings, full of smiles, constantly aware of her environment, and clearly well cared for."

The Bureau recommended adoption as a permanent plan, and that the court terminate Mother's parental rights.

The .26 hearing report, dated July 17, 2009, fails to mention that eight days earlier, on July 9, Mother pleaded no contest to one count of felony child abuse and apparently agreed to testify against A.W., her co-defendant in the criminal proceedings.

Mother claims that the report also fails to mention that she was released from custody on July 9—but it is unclear if she was. The order of probation does not direct Mother’s immediate release. The order reflects that Mother was sentenced to 365 days in county jail, with credit for 247 days, and the sentence was to commence forthwith. Likewise, the clerk’s minute order for July 9, 2009 does not indicate Mother was released.

At the .26 hearing on July 30, Mother did not appear. Her counsel stated, “I understand [Mother] has been released from Contra Costa custody.” We have no documents in our record to verify counsel’s understanding.

Apart from stating that she believed Mother was out of custody, Mother’s counsel objected to the Bureau’s recommendation, but submitted no evidence and made no argument. In particular, counsel did not argue the alleged change of custody status was a new circumstance justifying a different result from what the Bureau recommended. Counsel did not inform the court of the change of plea, much less argue that Mother’s acceptance of responsibility, and apparent cooperation regarding A.W.’s trial, amounted to changed circumstances. And counsel did not file a section 388 petition raising these issues.

The juvenile court adopted the Bureau’s recommendation, ordered a permanent plan of adoption, and terminated Mother’s parental rights.

II. DISCUSSION

Mother contends that the Bureau failed in its duty to provide all relevant information to the juvenile court. She claims the failure to include in the .26 hearing report the facts of her no contest plea, agreement to testify, and (possible) release from custody deprived her of due process. In particular, she speculates that the juvenile court might have reconsidered its earlier denial of reunification services.

There are two critical flaws to this contention. First, it was not raised below. Mother had counsel, but counsel failed to inform the court of the no contest plea and the agreement to testify—which Mother now argues was new information that could have changed the result of the .26 hearing. Specifically, counsel did not file a section 388

petition to argue changed circumstances. It is axiomatic that we do not consider appellate issues not properly raised below. (See, e.g., *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.)²

Second, there is no reasonable likelihood the new information would have changed the result of the hearing. The juvenile court was aware T.J. was flourishing in her foster placement with her siblings and two loving prospective adoptive parents. T.J. was eminently adoptable and the foster parents were more than willing to adopt her. No substantive argument against the adoption recommendation was presented by any party at the .26 hearing. The mere fact that Mother had reached a plea agreement and agreed to help the prosecution in the criminal case related to D.J. has little to do with the best interests of T.J. in her current circumstances.³

In her reply brief, Mother contends her trial counsel was ineffective for failing to file a section 388 petition. Of course, a claim of ineffective counsel is properly raised by a petition for writ of habeas corpus, and not on direct appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267; *In re Dennis H.* (2001) 88 Cal.App.4th 94, 98, fn. 1 (*Dennis H.*)). An exception to this rule obtains where there can be no satisfactory explanation for counsel’s action or inaction. (*People v. Pope* (1979) 23 Cal.3d 412, 426; *Dennis H.*, *supra*, at p. 98, fn. 1.)

Even if we were to assume this exception applies here, Mother cannot prevail on her claim of ineffective assistance of counsel. To do so, she must show not only that her counsel failed to perform in a manner expected of reasonably competent attorneys, but also that she was prejudiced thereby because it is reasonably probable she would have received a more favorable determination had a section 388 petition been filed. (See

² Mother could argue that counsel did inform the court of her change of custody status—but as we have said, the record does not establish that she was in fact released on July 9.

³ Mother also briefly argues the Bureau should have included in the report the fact that she appealed from the termination of her parental rights to D.J., M.W., and D.W. We see little significance in the mere fact of a filed appeal in the present context.

Dennis H., supra, 88 Cal.App.4th at p. 98.) For the reasons we have set forth above, Mother cannot show the necessary prejudice to state a claim of ineffective counsel.

III. DISPOSITION

The order terminating Mother's parental rights to T.J. is affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Dondero, J.